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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NOUR EDDINE ELASALI,

Plaintiff and Appellant,

v.

JOHN MAYER,

Defendant and Respondent.

D050885

(Super. Ct. No. GIC851701)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia A. Y. Cowett, Judge. Affirmed.

Plaintiff and appellant Nour Eddine Elasali appeals a judgment granting nonsuit to defendant and respondent James Mayer. Elasali, representing himself on appeal, contends the court erred by dismissing his judicial disqualification motion as untimely and granting Mayer's motion for nonsuit. We conclude the court correctly dismissed the judicial disqualification motion and correctly granted Mayer's motion for nonsuit.

FACTUAL AND PROCEDURAL BACKGROUND

Elasali retained Mayer to represent him in a property dispute. At the conclusion of that case, Elasali sued Mayer for legal malpractice. Elasali alleged Mayer's representation was negligent because Mayer failed to appear at a hearing and failed to timely file a notice of appeal.

After granting a number of continuances to both parties, the court set trial for January 4, 2007. On the first day of trial, Elasali filed a peremptory challenge to disqualify Judge Patricia Cowett under Code of Civil Procedure¹ section 170.6. Elasali alleged the court had improper contacts with opposing counsel at the December 21, 2006, trial readiness conference. The court dismissed the motion as untimely. The trial began, and Mayer moved orally for nonsuit under section 581c. The court granted the motion. The judgment after verdict of nonsuit states: "At the trial, plaintiff confirmed that he would be unable to produce any expert to render criticism of defendant's professional services or that he was beneath the applicable standard of care. As such it was determined plaintiff, NOUR EDDINE ELASALI, would be unable to sustain his burden of proof."

On March 23, 2007, Elasali moved for a new trial. The court denied the motion for new trial as untimely.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

DISCUSSION

I

Elasali argues the court erred in dismissing his section 170.6 peremptory challenge as untimely. Under section 170.6, the timely filing of an affidavit of prejudice disqualifies the judge without any showing of cause. The affidavit of prejudice is not contestable and disqualification is automatic. (§ 170.6, subd. (a)(2), (3).) Despite the generally liberal application of section 170.6, courts strictly require motions be timely made. (See *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 527.)

As a general rule, challenges are permitted under section 170.6 any time before the commencement of a trial or hearing. (§ 170.6, subd. (2); *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1171.) However, nearly all cases fall under one of three exceptions to the general rule: (1) the master calendar rule; (2) the all-purpose assignment rule; and (3) the 10-day/5-day rule. A challenge can be made any time before trial only when none of the three exceptions apply. (*People v. Superior Court (Lavi)*, *supra*, 4 Cal.4th at p. 1185.)

The all-purpose assignment exception governed the timeliness of Elasali's motion. An all-purpose assignment occurs when the assignment instantly pinpoints the judge likely to try the case and the judge is expected to process the case in its totality. (*People v. Superior Court (Lavi)*, *supra*, 4 Cal.4th at p. 1179.) Both factors were present here: Judge Cowett managed all aspects of this case, and she was identified in hearing notices as the trial judge.

Under the all-purpose assignment exception, any challenge to the assigned judge must be made within 10 days after notice of the all-purpose assignment. (§ 170.6, subd. (a)(2).)

Here, the all-purpose assignment occurred at the latest on April 26, 2006. On that date Judge Cowett granted Mayer's first motion for continuance and noticed parties she would preside at trial. Appellant had until May 1, 2006, to timely file a peremptory challenge. Appellant did not file the section 170.6 motion until January 4, 2007, the day of trial. The court correctly denied the motion as untimely.

II

Appellant contends the court erred by granting respondent's motion for nonsuit. An appeal from a judgment of nonsuit is guided by the rule requiring evaluation of the evidence in the light most favorable to the plaintiff, here Elasali. The court's judgment cannot be sustained unless interpreting the evidence favorably to Elasali's case and most strongly against Mayer and resolving all presumptions, inferences and doubts in favor of Elasali, a judgment for Mayer is required as a matter of law. (*Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588.) Because we have no record on which we may decide the issue, we are compelled to affirm the lower court.

Under section 581c, after plaintiff has given the opening statement, defendant, without waiving his or her right to offer evidence if the motion is not granted, may move for a judgment of nonsuit. (§ 581c, subd. (a).) A nonsuit is proper where the facts stated are insufficient to prove one or more essential elements of the plaintiff's case. (*Wright v. Arcade School Dist.* (1964) 230 Cal.2d 272, 276.) A nonsuit after the opening statement

is not favored and is rarely granted. The motion should be denied unless the opening statement is clearly insufficient as a matter of law. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.3d 149, 171-172.)

We are not able to review appellant's opening statement because there are no reporter's transcripts before us. Mayer elected to proceed with only the clerk's transcript in this case. From the clerk's transcript, we do know that on January 4, 2007, the court denied Elasali's motion to disqualify the trial judge, and the court then stated Elasali's requested jury trial would commence "forthwith". Following a recess, at 10:16 a.m. argument was heard on four motions in limine brought by Elasali. Three of the motions were denied by the court and one was unopposed. The court then inquired as to Elasali's financial status, and he was directed to complete a fee waiver for additional fees for the jury. Thereafter, at 11:20 a.m. Elasali was sworn and examined by the court, and his request to waive jury and reporter fees was granted "for this trial." Mayer then argued for a nonsuit, which was granted.

While the clerk's transcript helps us, it is not sufficient to decide the issues presented by appellant. According to the clerk's transcript, the parties went directly from inquiry and ruling on waiver of fees that would allow the jury trial to go forward, to argument by defendant for a nonsuit. The record does not reflect why counsel for Mayer, who was ordered by the court to prepare the judgment, describes the case as proceeding not by jury trial, but by bench trial. The record does not reflect why Elasali waived a jury after the trial court had just granted a waiver of jury and reporter fees. Most importantly, we have no record an opening statement was ever made.

We do know the court granted nonsuit on the ground that without an expert, Elasali would not be able to establish Mayer's representation fell beneath the applicable standard of care, the first element of a claim for legal malpractice. The court explained its decision in the judgment after verdict by nonsuit: "At the trial, plaintiff confirmed that he would be unable to produce any expert to render criticism of defendant's professional services or that he was beneath the applicable standard of care. As such it was determined plaintiff, NOUR EDDINE ELASALI, would be unable to sustain his burden of proof."

On appeal, we review only the grounds specified by the trial court for granting the nonsuit. The ground specified by the trial court was generic, Elasali's failure to produce experts to "render criticism of the defendant's professional services or that he was beneath the applicable standard of care." Mayer's nonsuit motion may in part have been based on Elasali's complaint that Mayer failed to appear at the default hearing or appeal the default judgment. On these grounds, his failure to produce an expert did not call attention to any defect in Elasali's case, and therefore the motion for nonsuit on those grounds should have been denied by the court.

However, and significantly, Elasali's complaint also alleged malpractice stemming from another case. It is possible that an expert was necessary to address whether negligence occurred in the trial of that case or presentation of that separate case.

Here is the difficulty we face: To decide this appeal, Elasali needed to provide this court with a trial transcript. That transcript would reflect Elasali's opening statement and the arguments he made before the trial court, in particular, the theories of the case set

forth in his opening statement. Without the reporter's transcript of the trial, we do not know what causes of action he actually proceeded on. Nor do we know why the trial court proceeded without a jury.

" 'It is the burden of the party challenging the fee award on appeal to provide an adequate record to assess error. [Citations.] Here, [Ketchum] should have augmented the record with a settled statement of the proceeding. [Citations.] Because [he] failed to furnish an adequate record of the attorney fee proceedings, [Ketchum's] claim must be resolved against [him].' [Citation.]" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)

Because it was Elasali's responsibility to present a reporter's transcript from which we can decide the issue presented, we are compelled to affirm the trial court.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

NARES, J.